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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-870

JOHN W. LEWIS, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Petitioner.

vs.

ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AN UNINCORPORATED LABOR ORGANIZATION; ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The majority, concurring and dissenting opinions of the Seventh Circuit are not yet reported; they are reproduced as Appendix "A", *infra*. The Findings of Fact and Conclusions of Law of the U. S. District Court for the Southern District of Illinois are not reported but are reproduced as Appendix "B", *infra*.

JURISDICTION.

The decision of the Seventh Circuit was rendered on September 18, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the political patronage system of government employment violates the First Amendment.

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE.

Respondents were employed in the office of the late Paul Powell, Illinois Secretary of State; all held minor non-civil service jobs such as clerks, building workers and license examiners. (App. 8-10, 563.)[1] Mr. Powell died in October, 1970; the petitioner herein, John W. Lewis, was appointed by the Governor of Illinois to serve the remainder of Mr. Powell's term. Thereafter, the respondents received letters terminating their employment; no reasons were given for the terminations. (App. 18-35.)

Respondents then brought suit under the Civil Rights Act of 1871,[2] alleging they were discharged for political party reasons, *i.e.*, because they were Democrats and refused to become Republicans or to support the Republican Party. They claimed that such discharge infringed their First Amendment right of free political association, and sought relief reinstating them to their jobs, awarding them

1. "App." citations herein refer to the typed Appendix filed by respondents in the Court of Appeals and now lodged with the Clerk of this Court.

2. 42 U. S. C. § 1983.

back pay and enjoining similar discharges of other employees in the future. (App. 15-17.)

Petitioner filed a motion to dismiss, later changed to a motion for summary judgment, claiming that respondents had stated no cause of action as a matter of law. (App. 228, 244.) Petitioner also filed an affidavit describing conditions of widespread inefficiency and confusion that he found to exist in the Secretary of State's Office when he replaced Paul Powell. (App. 233-45, 253.)

In opposition to the motion for summary judgment, respondents filed 94 affidavits of employees discharged by petitioner. (App. 263-454.) The affidavits stated in substantially identical language that affiants' job performances had been satisfactory. Only five of the 94 swore that they had been asked to change their affiliation to the Republican Party. (App. 313-14, 396-97, 408-10, 437, 453-54.)

The District Court entered summary judgment dismissing the complaint, supported by Findings of Fact and Conclusions of Law. (Appendix "B" *infra*.) The Court held that non-civil service employees serve at the will of their employer and that their summary discharge is not actionable under the First and Fourteenth Amendments as a matter of law. (Appendix "B" *infra*, p. B5.)[3]

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3. Additionally, the District Court made the findings that:

"(a) When Mr. Lewis assumed his post as Secretary of State, he caused a survey or study to be made of the manner in which the Office was being run; he found widespread conditions of inefficiency, laxity and confusion prevailing in many divisions and sections of the Office.

"(b) As a result, Mr. Lewis believed in good faith that it was vitally necessary, in the interest of improving the efficiency of the Office and protecting the interest of the public, to make immediate and large-scale changes in the manner in which the Office was being operated and in the ranks of personnel that were then employed.

"(c) In the staffing of the Secretary of State's Office, Mr. Lewis has not pursued a plan of recruiting an army of personnel to perpetuate himself in office either as Secretary of State or in any other elected post or position." (Appendix "B" *infra*, pp. B3-4.)

On appeal the Seventh Circuit reversed in a three-way split; each of the Judges on the panel filed a separate opinion. (Appendix "A", *infra.*) Judge Stevens concluded that the First Amendment prohibits discharge of non-civil service employees because of their political party affiliations; he remanded the cause to permit respondents to prove that they were in fact discharged solely because of their refusal to change political party allegiance.

Judge Campbell concurred in the result, but noted that the decision is in direct conflict with the holding of the Second Circuit in *Alomar* v. *Dwyer,* 447 F. 2d 482 (1971), *cert. denied,* 404 U. S. 1020 (1972), with the Pennsylvania Supreme Court's decision in *American Federation of State, County and Municipal Employees, AFL-CIO* v. *Shapp,* 280 A. 2d 375 (1971), and with the decision of the Eighth Circuit in *Norton* v. *Blaylock,* 409 F. 2d 772 (1969). Judge Campbell also expressed grave concern over "the impact of today's decision in thrusting the federal courts into the administration and daily operations of state and local governments." (Appendix "A" *infra,* p. A29.)

Judge Kiley dissented; he concluded that the Second Circuit's decision in *Alomar* v. *Dwyer, supra,* was correct and that the District Court should be affirmed.

Petitioner now seeks certiorari.

REASONS FOR GRANTING THE WRIT.

The decision below is an abrupt and complete departure from the long established principle that non-civil service government employment is terminable at the will of the employer. As this Court held in *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U. S. 886, 896 (1961), "It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[4] The Seventh Circuit's holding also is in direct conflict with decisions of at least three other Circuits and a State Supreme Court. The conflict involves a recurring federal issue of far-reaching public importance and plainly warrants prompt resolution by this Court.

I.

THE SEVENTH CIRCUIT'S HOLDING IS IN DIRECT CONFLICT WITH OTHER CIRCUIT AND STATE COURT DECISIONS.

As Judge Campbell candidly recognized in his concurring opinion below:

> "[I]t cannot be doubted that our decision stands in sharp and irreconcilable conflict with the decision of the Second Circuit in *Alomar* v. *Dwyer*, 447 F. 2d 482 (1971), and the decision of the Pennsylvania Supreme Court in *American Federation of State, County and Municipal Employees, AFL-CIO* v. *Shapp*, 280 A. 2d 375 (1971)." (Appendix "A" *infra*, p. A27.)

4. Other decisions so holding are, *e.g.*, *Keim* v. *United States*, 177 U. S. 290, 293-94 (1900) ("In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment."); *Taylor and Marshall* v. *Beckham (No. 1)*, 178 U. S. 548, 575-78 (1900); *Parsons* v. *United States*, 167 U. S. 324, 331-34 (1897); *Crenshaw* v. *United States*, 134 U. S. 99, 108 (1890).

In *Alomar* v. *Dwyer*, 447 F. 2d 482 (2d Cir. 1971), *cert. denied*, 404 U. S. 1020 (1972), plaintiff was a social worker for the City of Rochester, New York; she was discharged from her job without notice or hearing because she refused to change from the Democratic to the Republican Party.[5] Exactly as in the instant case, the plaintiff claimed that her discharge violated her First Amendment right of "free political association." The District Court dismissed the suit and the Second Circuit Court of Appeals affirmed *per curiam*. The Court of Appeals held:

> "If and when additional [government] positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court." (447 F. 2d at 483-84.)

This Court denied certiorari in *Alomar* without dissent on January 10, 1972. (404 U. S. 1020.) The Seventh Circuit in the instant case expressly rejected the holding of *Alomar* and of course reached an opposite result. A clearer and more direct clash between Circuits could not be envisaged.

So also, the decision below is in total conflict with the Pennsylvania Supreme Court's holding in *American Federation of State, County & Municipal Employees, AFL-CIO Shapp*, 280 A. 2d 375 (1971). The plaintiffs in *Shapp* were Republican non-civil service employees of the state who refused to change their political party loyalty when a Democratic administration came into power. In holding that the dismissals did not violate the First Amendment, the Court declared:

> ". . . We are compelled to hold that the Governor of Pennsylvania has the power and authority to hire and fire *at will* any and all employees who are not constitu-

5. As the Court of Appeals' opinion more piquantly put it, "The new Republican broom which swept into the Rochester City Hall in the spring of 1970 cleaned Democrat Daisy Alomar out." 447 F. 2d at 482.

tionally or statutorily protected—irrespective of their ability, their politics or their political connections. Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword." (280 A. 2d at 378.)

The Seventh Circuit specifically rejected and refused to follow the *Shapp* decision, as it did *Alomar*.

The Seventh Circuit's holding is also in direct collision with decisions of the Eighth Circuit and the District of Columbia Circuit. In *Norton* v. *Blaylock*, 409 F. 2d 772 (1969), the Eighth Circuit affirmed the holding of the District Court that the dismissal of a state department of welfare employee for political party reasons was not unconstitutional:

"... [T]he 14th Amendment to the Constitution has not yet been extended so far as to insure job security, as such, to public employees. Aside from considerations of race, religion or constitutionally protected conduct, ... a public employee still assumes the risk, as far as the Constitution is concerned, of being discharged for personal or political reasons." (285 F. Supp. 659, 662-63.)

Likewise, in *Bailey* v. *Richardson*, 182 F. 2d 46 (D. C. Cir.), *aff'd by an equally divided Court*, 341 U. S. 918 (1950), the Court held in sustaining the dismissal of a government employee under an Executive Order of the President:

"... [T]he plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of government employees because of their political beliefs, activities or affiliation. That document, standing alone, does not prevent Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans. From the beginning, such has been the practice, with variations in scope." (182 F. 2d at 59.)

In sum, the law of the Seventh Circuit is in direct conflict with that of the Second, Eighth and District of Colum-

bia Circuits and the State of Pennsylvania. Only this Court can resolve the conflict. Until it does, as Judge Campbell observed in his concurring opinion below, "it can reasonably be expected that the conflict and attendant confusion will grow and multiply as other courts are called upon to consider the same issue." (Appendix "A" *infra*, p. A28.)

Judge Campbell's statement has proved prophetic. The Seventh Circuit itself now has before it another appeal involving the same issue, *Burns* v. *Elrod*, Docket No. 71-1285 and 72-1541; the Court has stayed all proceedings in that appeal pending this Court's decision on the instant petition for certiorari. In *Burns*, the District Court (per Judge William J. Bauer) relied upon the Second Circuit's holding in *Alomar* v. *Dwyer, supra*, and dismissed a complaint alleging that the newly elected Democratic Sheriff of Cook County violated the First Amendment by firing Republican employees who refused to become Democrats. *Burns* v. *Elrod*, ... F. Supp. ..... (N. D. Ill., No. 71 C 607). The plaintiffs appealed and on October 18, 1972, the Seventh Circuit, *per Chief Judge Swygert and Judges Kiley and Stevens*, entered an Order staying all proceedings "pending an order by the Supreme Court accepting or rejecting . . . John W. Lewis' petition for a writ of certiorari [in *Illinois State Employees Union et al.* v. *Lewis*]."[6]

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6. A certified copy of the Seventh Circuit's order in *Burns* has been lodged in the Clerk's Office.

Another recent District Court decision in the Seventh Circuit in conflict with the holding below is *Shakman* v. *Democratic Organization of Cook County*, ... F. Supp. ..... (N. D. Ill., No. 69 C 2145, July 28, 1972). Judge Abraham L. Marovitz there held that "political considerations in public employment are only forbidden where those considerations affect voter-candidate-taxpayer rights and in all other respects patronage employees may be hired or fired based on political affiliation." (Slip Op. p. 20.)

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II.

THE DECISION BELOW MISAPPREHENDS AND CONFLICTS WITH THE DECISIONS OF THIS COURT.

The sharp disagreement among the judges below we believe clearly accentuates the necessity for review by this Court. Each of the three judges on the Court of Appeals arrived at a different interpretation of this Court's decisions on the subject of government employment—particularly *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sinderman*, 408 U. S. 593 (1972).

Judge Stevens believed that footnote 9 in the majority opinion in *Roth* effected the "demise" of *Bailey* v. *Richardson* and *Alomar* v. *Dwyer*, *supra*. Judge Campbell concurred, albeit most reluctantly, in the result reached by Judge Stevens, because he felt that such result was "dictated by the sweeping holding" of *Perry* v. *Sinderman*. Judge Kiley in dissent believed that neither *Roth* nor *Sinderman* supported the majority's decision, that *Alomar* and *Bailey* were not overruled by the *Roth* footnote and should be followed. In addition, three District Court judges in the Seventh Circuit are in disagreement with Judges Stevens and Campbell and have followed the holding of the Second Circuit in *Alomar* (Judge Poos in the instant case, Judge Bauer in the *Burns* case, and Judge Marovitz in the *Shakman* case, all cited at pp. 8-9, *supra*).

We submit that Judge Kiley was correct in his belief that neither *Roth* nor *Sinderman* compels the majority's holding. *Roth* held only that a non-tenured state college teacher was not entitled to notice and hearing prior to non-renewal of his teaching contract; his interest in reemployment was held not to constitute "liberty" or "property" under the Fourteenth Amendment. 408 U. S. 579. The footnote that Judge Stevens relied on (note 9 at p. 571) rejects the statement in *Bailey* that public employ-

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ment is a "privilege" and not a "right," but the footnote clearly does not overrule either *Bailey's* or *Alomar's* holding that non-civil service employees may be discharged for partisan political reasons.

Sinderman also involved a state college teacher whose contract was not renewed; it appeared without dispute that the nonrenewal was based on the teacher's prior testimony and public statements criticizing the Board of Regents. As Judge Campbell observed below, the case is distinguishable because it involved the "special and delicate area of 'academic freedom'" (Appendix "A" *infra*, p. A26).[7] There is certainly no suggestion in *Sinderman* (or *Roth*) that *Alomar* and *Bailey* should be considered overruled. Indeed, this Court denied certiorari in *Alomar* only six months prior to the decision in *Sinderman* (404 U. S. 1020); certiorari in fact had been granted in *Sinderman* (403 U. S. 917) at the time the petition for certiorari was filed in *Alomar*, and the *Alomar* petition specifically requested that it be granted and heard together with *Sinderman*. (*Alomar* v. *Dwyer*, Petition for Writ of Certiorari, p. 1, No. 71-568.) We cannot believe this Court intended to overrule or discredit the holding in *Alomar* by mere silence.

In sum, we respectfully submit that certiorari should be granted to resolve the conflict among circuits and the conflict within the Seventh Circuit itself. We believe that non-civil service employment is terminable "at the will of the appointing officer," *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U. S. 886, 896 (1961), and that this principle necessarily and properly carries with it the power to employ and discharge non-civil service workers on a political party basis. We submit that review by this Court is also critically warranted because of the manifest public importance and far-reaching impact of

7. See *Pickering* v. *Board of Education*, 391 U. S. 563 (1968); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

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the holding below. As Judge Campbell frankly recognized in his concurring opinion:

> "The conflicting and confused state of the law is troubling enough, but I am even more concerned over the impact of today's decision in thrusting the federal courts into the administration and daily operations of state and local governments. It seems to me that the inevitable effect will be to convert the federal courts into 'super civil service commissions' for all state and local government employees not covered by state or local civil service laws. Any and all such employees who are discharged can state an actionable claim in the federal district court by simply alleging (as plaintiffs have done here) that the discharge was caused by political party affiliations or activities. The federal courts will then be obliged to conduct full trials on the merits to determine whether the claims are factually well founded, and the resulting decisions will of course be appealable." (Appendix "A" *infra*, p. A29.)

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 1972.

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APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

SEPTEMBER TERM, 1971 JANUARY SESSION, 1972

No. 71-1619

ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, an unincorporated labor organization, et al.,
Plaintiffs-Appellants,

vs.

JOHN W. LEWIS, individually and as Secretary of State of the State of Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

No. 4743

Omer Poos,
Judge

ARGUED FEBRUARY 29, 1972 — DECIDED SEPTEMBER 18, 1972

Before KILEY and STEVENS, *Circuit Judges,* and CAMPBELL,* *District Judge.*

STEVENS, *Circuit Judge.* The question presented is whether a public employee may be discharged for failing

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

to support the partisan political activities of his immediate superior. Defendant contends as a matter of fact that plaintiffs were not discharged for any such reason and as a matter of law that such a reason is sufficient until political tradition—at least the patronage aspects of the "spoils" system—is superseded by appropriate legislation. We conclude that neither defendant's factual nor his legal defense has been established in this case. We start with the facts.

I.

The individual plaintiffs were employed by the late Paul Powell in the Illinois Secretary of State's office; all of them held non-civil service positions as building employees, clerical workers, license examiners and the like. After the defendant John W. Lewis was appointed by Governor Ogilvie to fill the unexpired term of Paul Powell, the plaintiffs received letters terminating their employment; the letters stated no reasons for the termination.

The plaintiffs later filed this action claiming that they were discharged because of their political affiliations, i.e., because they refused to become Republicans or to support the Republican Party and that a hearing would so show; plaintiffs claim that such discharge violated their rights under the First and Fourteenth Amendments to the U. S. Constitution.[1] The complaint predicated federal jurisdic-

1. Relying on this circuit's decisions in *Roth* v. *Board of Regents*, 446 F. 2d 806 (1971), and *Shirck* v. *Thomas*, 447 F. 2d 1025 (1971), plaintiffs also claimed that they could not be discharged without first being afforded the procedural due process rights of prompt notice and hearing. After oral argument we entered a hold order because the Supreme Court had granted certiorari in *Roth*. The Supreme Court reversed this circuit in *Roth, Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079 (June 29, 1972), and vacated our judgment in *Shirck, Thomas* v. *Shirck*, ... U. S. ....., 41 U. S. L. W. 3003 (June 29, 1972). The Court held that a non-tenured teacher had no Fourteenth Amendment "liberty" or "property" right to continued

tion upon the Civil Rights Act of 1871, 42 U. S. C. § 1983, and sought relief reinstating plaintiffs to their jobs, awarding them back pay and enjoining future discharges of other employees such as the plaintiffs.

Defendant filed a motion for summary judgment. The motion was supported by defendant's affidavit describing in detail conditions of widespread inefficiency and confusion which he found to exist in the Secretary of State's Office when he was appointed.[2] Defendant's affidavit stated

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employment and was therefore not entitled to a pretermination notice and hearing. The Court said that to have a "property" interest in a benefit a person "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." ..... U. S. at ....., 40 U. S. L. W. at 5082. One who takes a "patronage" job may not even have an expectation of keeping it when the appointing officer is replaced, let alone a "legitimate claim of entitlement" to such a job. *Roth* did indicate that different considerations might apply if a state, in dismissing or refusing to rehire an employee, made charges tending to damage his "good name, reputation, honor or integrity." We assume that the loss of a patronage job would in no sense reflect adversely on the discharged employee's reputation. And here, of course, no charges of misconduct were made—the discharges were made without any reasons being given. It is true that the reasons given by the Secretary in his affidavit might be construed as charging mismanagement, inefficiency and perhaps misconduct. However, the affidavit speaks in general terms and does not accuse any particular individual of dishonesty or lack of integrity. Moreover, charges made only in an effort to defend a lawsuit cannot be used to require a "notice and hearing" at a time before such charges were made. The hearing on any such charges is afforded by the judicial proceeding which provoked them. Thus, the Supreme Court's opinion in *Roth* requires that we reject the "notice and hearing" aspect of plaintiff's claim.

2. Specific examples of such conditions cited in the affidavit were:

"(a) There was no effective internal auditing system or procedure in effect to maintain efficient accounting, financial record-keeping or fiscal control.

"(b) There was no master or central filing system to assure safe custody, control or awareness of contracts, leases and other important documents.

"(c) There were no effective controls over purchasing

that "the efficiency of the office was at such a low ebb that in order to protect the public and to prevent a total breakdown of the Secretary of State's Office, it was vitally and immediately necessary to make large scale changes in the manner in which the office was being run and in the ranks of personnel that were then employed."

In opposing defendant's motion for summary judgment, plaintiffs sought to develop evidence which would dispute defendant's factual theory. They propounded written interrogatories to the defendant[3] and filed 94 affidavits of discharged employees. Each affiant described his duties and set forth facts tending to indicate that his job performance was satisfactory and that his discharge had been politically motivated.

Five of the affiants said that they had been contacted and requested to change their affiliations to the Republican Party. Thus, as an example, the handwritten affidavit

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procedures of the office and many purchases were being made by the office in a shockingly loose manner. There was no limitation of the authority of employees to sign orders for and receive services, supplies, transportation or repairs. As a consequence there was no effective control of these matters and it was impossible to determine whether the services and supplies so ordered and received were useful or necessary in the operation of the department.

"(d) The section of the office in charge of auditing of truck license plate reciprocity and pro-rating was grossly mismanaged in that the laws were not being enforced and truck license fees were not being collected impartially or diligently.

"(e) Much mail addressed to the office by members of the public had been unanswered and ignored.

"(f) Many of the public's applications for vehicle licenses had been lost or misplaced.

"(g) Vendors were selling their products in State buildings without written contracts."

3. The interrogatories sought the names and addresses of all persons hired or discharged by defendant after being sworn in as Secretary of State and the job titles and locations of the employment of all employees whom he had discharged.

of the plaintiff William Perry states that he was employed as a janitor in the Illinois State Building from October 1, 1965, to March 5, 1971,[4] and was told by his supervisor, Mr. Reed, that he would be able to keep his job if he joined the Republican Party. Affiant Betty Jean Sikes swore that she "was approached by Mr. W. Estes of the Republican Party—who filled out a paper—and said I would be retained in my present position but I would have to vote Republican."[5] Robert D. Wise, a driver's license examiner who conducted road tests in Joliet, Illinois, swore that he "was approached by Mr. Hall, of the Republican Party, and he told me I would have a better chance of staying if I would change over to the Republican Party or Republican sponsorship. This was told to all members of the station at 4:30 P.M., at a meeting conducted by Mr. Hall, who said that we would be replaced as soon as they acquired new employees (Republicans)."[6]

The district court entered summary judgment for defendants and also entered "findings of fact" and conclusions of law. In substance, the court found that defendant's version of the facts was correct. Implicitly the court held that plaintiffs' affidavits were insufficient as a matter of law and that the answers to plaintiff's interrogatories (which had not yet been filed) could not lead to the discovery of relevant evidence creating a material issue of fact.

It is, of course, well settled that a district court may not resolve issues of fact on a motion for summary judg-

4. "My job was to bail papper & keek [sic] the dock clean . . . [M]y supervisor told me I was doing a good job—February 4, 1971 . . . I was a registered member of the Democratic Party in Madison County. I was approached by my supervisor, Mr. Reed, that if I joined the Republic Party, I would be able to keep my job. February 4, 1971. I was terminated from my job on the 5 day of March, 1971. They gave me no reason why I was being let out." A. 396-397.

5. A. 409.

6. A. 454.

ment.[7] Nor should such a judgment be entered until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion.[8] It is especially important to observe these procedural requirements when evidence of motivation is of critical importance.[9] To the extent,

7. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627. The five affidavits specifically reciting that the employees were requested to change their affiliation to the Republican Party are sufficient, in our opinion, to create a genuine issue of material fact. The district court might have considered the issue "immaterial" on the theory that plaintiffs would have no claim even if they had been discharged for "political" reasons. Since we reject that theory, summary judgment was inappropriate.

8. Rule 56, Fed. R. Civ. P., clearly contemplates that interrogatory answers may be considered on a motion for summary judgment. If discovery is needed to permit the opponent of a summary judgment motion to gather sufficient information to raise a material issue of fact, elementary fairness requires that he have an opportunity to pursue that discovery. In *Bane* v. *Spencer*, 393 F. 2d 108 (5th Cir. 1968), *cert. denied*, 400 U. S. 866, the court said:

> "Furthermore, it should be fundamental that a defendant who has failed to answer relevant and timely interrogatories is, at least normally, in no position to obtain summary judgment." *Id.* at 109.

In ordering a remand to afford the losing party on summary judgment an opportunity for discovery on a material issue, the District of Columbia Circuit has said:

> "This holding in no way supports the view that a mere request for answers to interrogatories will operate to bar the trial court from acting on a motion for summary judgment. It is incumbent upon the party seeking answers to demonstrate that his inquiry is directed toward establishing the 'material facts' and that upon receipt of those answers he will be armed to defend against that motion. This holding does not support harassment tactics or requests for information that is equally accessible to both parties. We simply decide this case on its facts as applied to our reading of Rule 56(e)." *Washington* v. *Cameron*, 411 F. 2d 705, 711 (1969).

Similarly here, we simply decide that these interrogatories should have been answered before the court ruled on the summary judgment motion.

9. "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and

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therefore, that the district court's decision is predicated on a rejection of plaintiffs' version of the facts, it plainly cannot stand.

We, of course, do not decide that plaintiffs' version of the facts is the correct one. But since there has been no trial, in order to test the legal sufficiency of their claims, we must assume that they can prove their case. Thus, our analysis of the law assumes that plaintiffs were performing their jobs competently, that they have no responsibility for determining policy, that they were discharged simply because they are Democrats, and that, in at least some instances, they were offered continued employment if they would actively support the Republican Party.

The legal issue which is therefore presented is whether a non-policy making employee, such as a janitor or a driver's license examiner, may be discharged for refusing to transfer his political allegiance from one political party to another.

II.

There are three objections to our consideration of this issue which should first be frankly identified. It is urged (1) that the issue is "political" and therefore unfit for judicial determination; (2) that federal judges may not impose a civil service system on the State of Illinois; and (3) that a tradition of almost 200 years of uninterrupted acceptance of the "patronage system" may not be overcome by judicial fiat.

1. This controversy between the plaintiffs and their

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conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473. See also *White Motor Co.* v. *United States*, 372 U. S. 253, 259; *Williams* v. *Allen*, 439 F. 2d 1398, 1401 (5th Cir. 1971).

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former employer does not present the kind of "political question" that is nonjusticiable.[10]

By application of the "political question" doctrine, the Supreme Court has decided that certain kinds of issues are unfit for federal judicial determination. In situations in which the Court recognized the paramount interest in attributing finality to determinations by the political departments of the federal government—as in matters dealing with war, foreign affairs, the preservation of Indian tribal organizations, or rival claims to recognition as the lawful government of a State—the Court has described the issue as a "political question" and therefore nonjusticiable. In those cases the Court has also stressed the absence of judicially manageable standards for resolving the dispute or fashioning appropriate relief.[11]

It is well settled that our duty to accord appropriate respect to a state's sovereignty does not require us to accord finality to a decision to dismiss an employee for an impermissible reason, or a policy of discrimination

10. The scope of the "political question" doctrine is exhaustively reviewed both in Mr. Justice Brennan's opinion for the Court and in Mr. Justice Frankfurter's famous dissent in *Baker* v. *Carr*, 369 U. S. 186, 208-237, 280-301, 330.

11. Summarizing its review of the principal political question cases in *Baker* v. *Carr*, the Court stated:

> "We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable 'political question' bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking." 369 U. S. 186, 226.

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against members of a particular race, religion, or political faith in the award or withholding of public benefits. Nor is there any lack of judicially manageable standards in cases of this kind. The motivation for the dismissal of state employees was the critical issue in a wide range of cases which the Supreme Court has routinely treated as justiciable. The underlying rationale for the "political question" doctrine plainly has no application to this case.

Of course the word "political" may be applied to several facets of this dispute. The plaintiffs may have acquired their jobs for "political" reasons; they seek to vindicate a "political" right; the outcome of the litigation will have "political" consequences; and, perhaps of greatest significance, defendant's alleged employment practices are supported by ancient and respected "political" tradition. But, as Mr. Justice Holmes so aptly stated, an "objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, ..." *Nixon* v. *Herndon*, 273 U. S. 536, 540. We are satisfied that the case before us is not within "that class of political controversy which, by the nature of its subject, is unfit for federal judicial action." *Baker* v. *Carr*, 369 U. S. at 330 (Mr. Justice Frankfurter, dissenting).

2. Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retire-

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ment.[12] A federal court has no power to establish any such employment code.

However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and those which are not. There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in *Perry* v. *Sindermann*, ... U. S. ....., 40 U. S. L. W. 5087 (June 29, 1972).

Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review.[13] There is no merit to the argument that

12. See, *e.g.*, the Illinois Personnel Code, 127 Smith-Hurd Ill. Stat. Anno. § 63b101-§ 63b119.

13. In *Board of Regents* v. *Roth*, discussed in note 1, *supra*, the Supreme Court concluded that a non-tenured teacher had no "liberty" or "property" interest in his job and was therefore not entitled to a "due process" hearing before being denied a contract renewal. But on the same day the Court recognized that, completely independent of a protected interest in the job, a teacher had a First Amendment right—an aspect of "liberty" in

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recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State.

3. Finally, our answer to the constitutional question is not foreclosed by the fact that the "spoils system has been entrenched in American history for almost two hundred years." *Alomar* v. *Dwyer*, 447 F. 2d 482, 483 (2d Cir. 1971), *cert. denied*, 404 U. S. 1020.[14] For most of that period it was assumed, without serious question or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his summary removal. See *Bailey* v. *Richardson*, 182 F. 2d 46, 59 (D. C. Cir. 1950), *affirmed per curiam by an equally divided Court*, 341 U. S. 918; *Adler* v. *Board of Education*, 342 U. S. 485. But as Mr. Justice Marshall so forcefully stated in 1965 when he was a circuit judge, "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239 (2d Cir. 1965).[15] The development of constitutional law subsequent to the Supreme Court's unequivocal repudiation of the line of cases

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the Fourteenth Amendment—which could not be abridged by the imposition of a penalty of job forfeiture for its exercise. *Perry* v. *Sindermann*, ... U. S. ....., 40 U. S. L. W. 5087 (June 29, 1972).

14. It may be correct that the patronage system has been followed for "almost two hundred years" and therefore was in existence when the Constitution was adopted. However, the notoriety of the practice in the administration of Andrew Jackson in 1828 implies that it was not prevalent therefore; we are not aware of any discussion of the practice during the drafting of the Constitution or the First Amendment. In any event, if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure. See *Cousins* v. *City Council of the City of Chicago*, ... F. 2d ..... (7th Cir. May 25, 1972, No. 71-1077) slip opinion at p. 35, n. 18 (dissenting opinion).

15. Quoted with approval in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605-606.

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ending with *Bailey* v. *Richardson* and *Adler* v. *Board of Education* is more relevant than the preceding doctrine which is now "universally rejected."[16]

We therefore abjure argument founded only on political tradition in the State of Illinois or on notions of policy which may or may not lead to the extension of the civil service system; such arguments are properly the concern of the General Assembly of the State of Illinois. Our concern is with the First Amendment rights of a citizen

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16. Defendant relies heavily on the holding of the Court of Appeals for the District of Columbia in *Bailey* v. *Richardson*:

> "It is next said that appellant's dismissal impinged upon the rights of free speech and assembly protected by the First Amendment, since the dismissal was premised upon alleged political activity. • • • But the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations." 182 F. 2d 46, 59.

The invalidity of the premise underlying that holding was described by the Supreme Court only a few weeks ago:

> "In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." ' *Graham* v. *Richardson*, 403 U. S. 365, 374. See, *e.g.*, *Morrissey* v. *Brewer*, ... U. S. ....., ...; *Bell* v. *Burson*, 402 U. S. 535, 539; *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Shapiro* v. *Thompson*, 394 U. S. 618, 627, n. 6; *Pickering* v. *Board of Education*, 391 U. S. 563, 568; *Sherbert* v. *Verner*, 374 U. S. 398, 404." *Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079, 5081 n. 9.

The significance of the demise of *Bailey* v. *Richardson* is especially noteworthy in view of the Second Circuit's reliance, in its per curiam opinion in *Alomar* v. *Dwyer*, 447 F. 2d 482, 483 (2nd Cir. 1971), *cert. denied*, 404 U. S. 1020, on the same language from the *Bailey* opinion that defendant has quoted to us.

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named Perry whose sovereign offered him a choice between profession allegiance to the Republican Party or surrendering his position as a janitor in the State House.[17] If he can prove that his employment was terminated because he made the wrong choice, has any right protected by the First Amendment been abridged? We think the Supreme Court has answered this question for us in rather plain language.

III.

In 1949 a closely divided Supreme Court upheld a statute prohibiting federal civil service employees from taking an active part in partisan political activities. *United Publc Workers* v. *Mitchell*, 330 U. S. 75. The dissenting Justices felt that such an abridgment of First Amendment rights could not be justified.[18] The majority, how-

17. For purposes of decision we accept defendant's argument that *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970), *cert. denied*, 402 U. S. 909, is not controlling because the plaintiffs' allegations do not indicate—and the defendant's affidavit denies—that defendant's employment practices were so widespread as to disadvantage candidates and voters who attempted to use the electoral process to change the direction of government. *Id.* at 270. The holding of *Shakman* is, however, in complete accord with our decision here.

18. In dissent, Mr. Justice Black stated:

"To punish millions of employees and to deprive the nation of their contribution to public affairs, in order to remove temptation from a proportionately small number of public officials, seems at the least to be a novel method of suppressing what is thought to be an evil practice.

"Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed—at least such is the assumption of the First Amendment. That Amendment, unless I misunderstand its meaning, includes a command that the Government must, in order to promote its own interest, leave the people at liberty to speak their own thoughts about

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ever, concluded that the government's interests in not compromising the quality of public service and in not permitting individual employees to use their public offices to advance partisan causes were sufficient to justify the limitation on their freedom.[19]

There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification—the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other—would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

> "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power but, because there are some limitations, it does not follow that a prohibition aganist acting as ward leader or worker at the polls is invalid." 330 U. S. 75, 100.

In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. *Wieman* v. *Updegraff*, 344 U. S.

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government, advocate their own favored governmental causes, and work for their own political candidates and parties." 330 U. S. at 114.

19. 330 U. S. at 94-100.

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183, 191-192. That decision did not recognize any special right to public employment;[20] rather, it rested on the impact of the requirement on the citizen's First Amendment rights.[21] We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the Oklahoma employees' interest in associating with Communists or former Communists.[22]

In 1961 the Court held that a civilian cook could be summarily excluded from a naval gun factory. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886. The government's

20. Referring to a portion of the opinion in *Adler* v. *Board of Education*, 342 U. S. 485, 492, the Court said:

"To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue." 344 U. S. at 191.

And on the next page the Court said:

"We need not pause to consider whether an abstract right to public employment exists."

21. In his concurring opinion Mr. Justice Black equated ineligibility for public employment with punishment. He wrote:

"Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.

• • • • •

"It seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as of right and not on sufferance of legislatures, courts or any other governmental agencies." 344 U. S. at 193-194.

22. In *United States* v. *Robel*, 389 U. S. 258, the Court again afforded protection to the First Amendment rights of association of a member of the Communist Party. The Court unequivocally reaffirmed the proposition "that the right of association is specifically protected by the First Amendment." 389 U. S. at 263.

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interest in maintaining the security of the military installation outweighed the cook's interest in working at a particular location. Again, however, the Court explicitly assumed that the soverign could not deny employment for the reason that the citizen was a member of a particular political party or religious faith—"that she could not have been kept out because she was a Democrat or a Methodist." 367 U. S. at 898.

In 1968 the Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering* v. *Board of Education*, 391 U. S. 563, 574. The Court noted that although criminal sanctions "have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Ibid.* The holding in *Pickering* was a natural sequel to Mr. Justice Frankfurter's comment in dissent in *Shelton* v. *Tucker* that a scheme to terminate the empoyment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 U. S. 479, 496.

In 1972 the Court reaffirmed the proposition that a nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. *Perry* v. *Sindermann*, ... U. S. ....., 40 U. S. L. W. 5087 (June 29, 1972). The Court's explanation of its holding is pertinent here:

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit of any number of reasons, there are some reasons upon which

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the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, has interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

"We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall, supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485-486; *Torasco* v. *Watkins*, 367 U. S. 488, 495-496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 17; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605-606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education, supra*, with *Shelton* v. *Tucker, supra*.

"Thus the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. . . ." ..... U. S. at ....., 40 U. S. L. W. at 5088-5089.

This circuit has given full effect to this principle. In *Kiiskila* v. *Nichols*, in his opinion for the court sitting *en banc*, Chief Judge Swygert explained:

"A citizen's right to engage in protected expres-

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> sion or debate is substantially unaffected by the fact that he is also an employee of the government and, as a general rule, he cannot be deprived of his employment merely because he exercises those rights. This is so because dismissal from government employment, like criminal sanctions or damages, may inhibit the propensity of a citizen to exercise his right to freedom of speech and association. *Pickering* v. *Board of Education, supra* 391 U. S. at 574, 88 S. Ct. 1731. To protect society's interest in uninhibited and robust debate the first amendment demands that government be prohibited from inhibiting or suppressing speech by indirection through discharge of a government employee when the same objective could not constitutionally be achieved by criminal sanctions or other direct means. *United States* v. *Robel,* [389 U. S. 258]" 433 F. 2d 745, 749 (7th Cir. 1970).

And more recently Judge Hastings succinctly stated "that public employment may not be conditioned upon the surrender of constitutional rights." *Donahue* v. *Staunton,* ..... F. 2d ..... (7th Cir. July 6, 1972, No. 71-1160) slip opinion p. 8. See also *Hanover Township Federation of Teachers Local 1954 (AFL-CIO)* v. *Hanover Community School Corp.,* 457 F. 2d 456, 459-460 (7th Cir. 1972).

Accepting the premise, as *United Public Workers* v. *Mitchell,* 330 U. S. 75, holds that state interests may justify some curtailment of the political activities of public employes, it seems perfectly clear that the abject and complete surrender of a citizen's First Amendment rights could never be justified. No state interest could justify a requirement that an employee falsely swear allegiance to an offensive religious or political faith, or a requirement that he actively work for, or speak out in favor of, a political cause be deemed obnoxious. The basic rights of citizenship survive acceptance of public employment.

If the conditions attached to public employment merely involve some curtailment—as opposed to abject surrender

—of First Amendment rights, interests of the State "if strong enough" may justify the condition.[23] As a procedural matter, the burden of establishing such justifica-

23. In his opinion in *Donahue* v. *Staunton*, Judge Hastings noted:

"Interests of the State which, if strong enough, the Court in *Pickering* felt might lead to a different result in the future are: (1) maintaining discipline or harmony among co-workers; (2) need for confidentiality; (3) employee's position may be such that his false accusations may be hard to counter because of the employee's presumed greater access to the real facts; (4) statements which impede the employee's proper performance of this daily duties; (5) statements so without foundation as to call into question his competency to perform the job; and (6) a close and personal working relationship between the employee and supervisor which called for personal loyalty and confidence." ..... F. 2d at ..... (slip opinion, at p. 9).

Chief Judge Swygert, in dissent stated:

"*Pickering* v. *Board of Education*, 391 U. S. 563 (1968), does not wipe out all curtailment of a public employee's right to speak. '[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' 391 U. S. at 568. The Court went on to explain that a balance of competing interests must be struck. 'The problem in any case is to arrive at a balance between the interests of the . . . [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Id.* at 568.

"I read *Pickering* to hold that if the functions of a public entity are substantially impeded by an employee's statements relating to those functions, measures may be taken to regulate such speech even to the point of terminating employment. If that reading is correct, then the following view expressed by the Eighth Circuit in *Jenson* v. *Olson*, 353 F. 2d 825 (8th Cir. 1965), even though predating *Pickering*, has continuing vitality: 'When his . . . [the employee's] speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech.' " ..... F. 2d at ..... (slip opinion at p. 14).

tion rests upon the defendant. In view of the importance which the Court has consistently attached to the First Amendment rights of the citizenry, that burden is a heavy one. Without such justification, the foregoing cases demonstrate that plaintiffs have alleged an impermissible basis for their discharge. We must therefore consider the matter of justification.

IV.

Three separate justifications have been brought to our attention: (1) plaintiffs themselves are the beneficiaries of the patronage system and should not be heard to complain of its routine and foreseeable consequences—as the Supreme Court of Pennsylvania stated, those who "live by the political sword must be prepared to die by the political sword." *American Federation of State, County and Municipal Employees (AFL-CIO)* v. *Shapp*, 280 A. 2d 375, 378 (1971); (2) political affiliations may be a relevant and proper qualification for certain positions; and (3) in all events, effective administration of departments of government requires public, like private, executives to have broad latitude in appointing, replacing, and discharging personnel—any rule that provides the nontenured employee with an easily alleged cause of action for wrongful discharge necessarily inhibits that managerial discretion. Each of these three points is substantial and warrants separate consideration.

1. The first argument is predicated on factual assumptions not now a matter of record in this case. In essence, it is suggested that each discharged employee accepted his job with knowledge that he would be fired if, and when, the appointing officer was replaced by a member of the opposite political party. If so, perhaps each plaintiff has waived any right to object to the fully anticipated event which has now come to pass.

But the factual assumption may or may not be valid.

Even if judicial notice of such matters were proper, it would be unreasonable for us to assume that every non-tenured public servant was employed on such a purely political basis. In *Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079 (June 29, 1972), the Supreme Court refused to accord any greater constitutional protection to the non-tenured teacher's prospects of future employment than to such prospects of other public employees. We cannot properly differentiate between teachers and highway maintenance workers, pilots, law clerks, driver's license examiners or janitors on the basis of mere judicial assumptions about the circumstances attending their respective employment. The particular factual basis for a waiver defense may vary as between different plaintiffs and different job classifications, and may, at best, limit the scope of relief rather than foreclosing the claim altogether.[24]

The colorful phrasing of the waiver defense by the Pennsylvania Supreme Court suggests that the right which may have been waived is a right to continued public employment. But we have assumed that no such right exists. The right which plaintiffs seek to vindicate is their constitutional right of association protected by the First Amendment. The United States Supreme Court has repeatedly indicated that a waiver of constitutional rights will not lightly be assumed.[25] Accordingly, until a factual basis for

24. In an entirely different context we have recently noticed that waiver, unlike the defense of estoppel, may merely foreclose the recovery of past damages. *Continental Coatings Corp.* v. *Metco, Inc.*, ... F. 2d ..... (7th Cir. July 21, 1972, No. 71-1266).

25. It is, of course, well settled that " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464, quoting from *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393; *Hodges* v. *Easton*, 106 U. S. 408, 412, and *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307. See *Smith* v. *United States*, 337 U. S. 137, 150 and n. 11; *Carnley* v. *Cochran*, 369 U. S. 506, 514; *Brookhart* v. *Janis*,

a waiver defense is supported by evidence, we may not determine either its sufficiency or its effect. We are satisfied, however, that the possibility that such a defense may be asserted cannot provide the basis for an affirmance of the district court's judgment.

2. The second suggested justification will also have different validity for different employees. Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials. Moreover, considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. It is difficult to believe, however, that any such justification would be valid for positions such as janitors, elevator operators or school teachers. Thus, again, justification is a matter of proof, or at least argument, directed at particular kinds of jobs. The possibility of such valid justification for some positions does not afford a basis for dismissing all of plaintiffs' claims without a trial.

3. The third possible justification would appear to have the greatest force. It is given concrete factual support by defendant's detailed affidavit and legal support by opinions recognizing that a public employer, like his private counterpart, has a significant interest in effective supervision of his employees. The factual question, however, must await the outcome of the trial since, as we have already noted, plaintiffs have not completed their discovery and have filed affidavits which, if true, tend to undermine the broad position asserted by defendant, or at least to impeach his justification in particular instances.

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384 U. S. 1, 4: *Illinois* v. *Allen*, 397 U. S. 337, 343. See also *Stevens* v. *Marks*, 383 U. S. 234, 243-244:

> "Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any justification for denying the right to withdraw it."

But *cf.* Mr. Justice Harlan's separate opinion, *id.* at 246, 248.

The legal proposition that the State has a strong interest in allowing its executives to exercise broad discretion in the performance of their managerial functions is, of course, well established.[26] The State's interest in avoiding the interference with managerial discretion which may result from litigation brought by dismissed employees would appear especially strong because the number of employees potentially affected by the rule at issue in this case is so large. It is therefore not frivolous to suggest that the State's interest in the efficient administration of its affairs justifies a rule of law which would defeat all claims such as plaintiffs'. However, there are several considerations which, we believe, foreclose such a rule.

If a government department is, in fact, managed on a nonpolitical basis, there is little likelihood that litigation alleging that dismissals were politically motivated would seriously hamper the administration of that department. There is always some risk of such litigation, but that risk is inherent in the performance of the work of government. It is now axiomatic "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 897-898. The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost.

That cost will loom large only if it is assumed that political considerations will motivate a large number of employment decisions. Unquestionably, to the extent that department heads in fact employ or dismiss highway maintenance workers, elevator operators, janitors, and comparable employees on the basis of their political affiliation,

26. See note 23, *supra*.

they may find it necessary to defend litigation and burdensome to explain their decisions. But to the extent employment decisions are based on political considerations, they involve a factor not normally present in the private sector; the tendency of that factor quite clearly is in the direction of less, rather than more, efficiency.[27] Thus, reflection per-

27. The courts which have upheld the patronage system have assumed as a matter of policy that it wreaks "a devastating effect . . . upon the orderly administration of government." See *Alomar* v. *Dwyer*, 447 F. 2d 482, 483 (2d Cir. 1971), *cert. denied*, 404 U. S. 1020. Similarly, the majority of the Supreme Court of Pennsylvania acknowledged regret at finding it necessary to sustain the patronage system in that State. See *American Federation of State, County and Municipal Employees* v. *Shapp*, 280 A. 2d 375, 378. The Supreme Court's comment in *Ex Parte Curtis* about a requirement that a public employee contribute private funds to a political campaign would apply equally to a requirement that he contribute services:

> "A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor,—to avoid a discharge from service, not to exercise a political privilege.
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> • • • • •
>
> If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see than an increase of compensation may be required to provide the means to make the contribution, and that in this way the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." 106 U. S. 371, 373-375.

See also *United Public Workers* v. *Mitchell*, 330 U. S. 75, 121-123 (Mr. Justice Douglas dissenting in part).

suades us that in the long run the State's strong interest in efficient management is at least consistent with, and may well favor, the recognition and protection of the constitutional rights asserted in this case.

Of greater significance is the fact that as the number of employees affected is increased, the importance of preserving their First Amendment freedoms likewise grows. Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the same of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.

V.

The preceding section of this opinion raises questions about the plaintiffs' apparent assumption that all of their claims have equal merit. Their complaint was filed "on behalf of the entire class of union members employed by the Defendant, as Secretary of State." No doubt the class action would have been proper if plaintiffs' procedural due process claim were still in the case. Whether the district court should now determine that a class action is appropriate, or if so, how the class or classes should be defined, either for discovery or trial purposes, are matters best appraised by the district court in the first instance. Other than identifying the problem, we express no opinion on such matters.

Nor do we make any decision about the nature or scope of relief which may be appropriate if one or more of the plaintiffs should prevail. We merely hold that the district

court committed error when he entered summary judgment for the defendant. The record does not support a factual finding that no plaintiff was dismissed for an impermissible reason or the legal conclusion that defendant was justified in prescribing active support of the Republican Party as a condition of continued public employment.

Plaintiffs are entitled to an opportunity to prove their case. The judgment is reversed and the case is remanded to the district court for further proceedings.

CAMPBELL, *District Judge*, concurring.

The scholarly and perceptive exposition of the pertinent case law so ably expressed by Judge Stevens, persuades me to concur in the result reached by our decision. Indeed, I must, for such a result is dictated by the sweeping holding of the Supreme Court in *Perry* v. *Sindermann*, ... U. S. ....., 40 U. S. L. W. 5087 (June 29, 1972).[1]

Sindermann is arguably distinguishable from this case on its facts; it did not involve a discharged public employee who alleged, as here, that his dismissal was predicated upon his political party affiliation or activities. Rather, the plaintiff there, a state college teacher, claimed that his employment was terminated because of his statements criticizing the college's Board of Regents, purportedly made in the exercise of his First Amendment right of free expression. The case was thus similar to prior decisions in the special and delicate area of "academic freedom." such as *Keyishian* v. *Board of Regents*, 385 U. S. 589,[2] and *Pickering* v.

1. Although my remarks are confined to the First Amendment aspects of today's ruling, I agree fully with Judge Stevens that the Supreme Court's decision in *Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079 (June 29, 1972) forecloses the plaintiffs' Fourteenth Amendment claim that they were entitled to "notice" and a "hearing" before their employment could be terminated.

2. The Court held in *Keyishian*:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not

Board of Education, 391 U. S. 563, and could have been decided, in my view, within the framework of such precedents. However, the language of *Sinderman* is not so circumscribed but appears far-reaching and manifestly unequivocal. Thus:

> "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 375 U. S. 513, 526. Such interference with constitutional rights is impermissible." (..... U. S. ....., 40 U. S. Law Week at 5088.)

Sindermann was decided after briefing and argument of the case at bar and, as I have stated above, prompts me to concur in the result reached by Judge Stevens' thoughtful opinion. I am constrained at the same time, however, to candidly express several observations that I believe are highly relevant, if not critical, concerning the import and effect of our ruling.

First, it cannot be doubted that our decision stands in sharp and irreconcilable conflict with the decision of the Second Circuit in *Alomar* v. *Dwyer*, 447 F. 2d 482 (1971), and the decision of the Pennsylvania Supreme Court in *American Federation of State, County and Municipal Employees, AFL-CIO* v. *Shapp*, 280 A. 2d 375 (1971). Both of those Courts squarely rejected, as a matter of law, the precise claim made by the plaintiffs here, *i.e.*, that they were discharged from their government jobs because of their allegiance to one political party and refusal to join or support another, and that such discharge violated their First Amendment rights of free association. Both *Alomar*

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merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U. S. at 603.

and *Shapp* were decided within a year prior to *Sindermann*. Indeed the Supreme Court without a dissenting voice denied certiorari in *Alomar* on January 10, 1972, *only six months* prior to that Court's decision in *Sindermann*. *Alomar* v. *Dwyer*, 404 U. S. 1020. Too, discussion or even citation of *Alomar* or *Shapp* was conspicuously omitted from the *Sindermann* opinion (or in the concurring and dissenting opinions).

Thus, as matters now stand, the declared law of the Second Circuit and of the State of Pennsylvania is diametrically opposed to the law of this Circuit, as so ably formulated and announced herein.[3]

Moreover, it can reasonably be expected that the conflict and attendant confusion will grow and multiply as other courts are called upon to consider the same issue. Indeed, it should be noted that at least two District Judges in this Circuit have recently followed the *Alomar* and *Shapp* decisions, and thus have rejected claims that public employees cannot be discharged because of their political party affiliations without violating the First Amendment. In *Burns* v. *Elrod*, ... F. Supp. ..... (No. 71 C 607, N. D. Ill., May 31, 1972), Judge Bauer dismissed a complaint alleging that the newly elected Democratic Sheriff of Cook County violated the First Amendment by discharging Republican employees who refused to become Democrats. And in *Shakman* v. *Democratic Organization of Cook County*, ... F. Supp. ..... (No. 69 C 2145, N. D. Ill., July 28, 1972), Judge Marovitz held, in reliance upon *Alomar* and *Burns*, that, "political considerations in public employment are only forbidden where those considerations affect voter-candidate-taxpayer rights and in all other respects patronage employees may be hired or fired based on political affiliation." (Slip Opinion, p. 20.)

3. In accord with *Alomar* and *Shapp*, and also in conflict with our decision, is the holding of the Eighth Circuit in *Norton* v. *Blaylock*, 409 F. 2d 772 (1969), affirming the decision of the Western District of Arkansas, 285 F. Supp. 659 (1968).

The conflicting and confused state of the law is troubling enough, but I am even more concerned over the impact of today's decision in thrusting the federal courts into the administration and daily operations of state and local governments. It seems to me that the inevitable effect will be to convert the federal courts into "super civil service commissions" for all state and local government employees not covered by state or local civil service laws. Any and all such employees who are discharged can state an actionable claim in the federal district court by simply alleging (as plaintiffs have done here) that the discharge was caused by political party affiliations or activities. The federal courts will then be obliged to conduct full trials on the merits to determine whether the claims are factually well founded, and the resulting decisions will of course be appealable.

In this case alone, the number of trials and appeals could total as high as 1,946—the number of employees that the defendant Lewis claims he "found it necessary to discharge" after he became Secretary of State "because of the laxity, inefficiency and confusion prevailing in the Office." And this represents the possible number of trials and appeals arising from but *one* department of a State's government and *one* change of administration in that department! Considering that there are thousands of state, county and municipal employees not covered by civil service, and that changes of political administration occur in many departments of state and local government after every election, the volume of potential litigation which could result from our decision truly becomes catastrophic.

The scope and complexity of the litigation problems created by our ruling are not lessened by our limiting its applicability to "non-policy making" government personnel. It is simple enough to say that janitors, clerk-typists and elevator operators are "non-policy making" employees, but how far up in the bureaucratic echelon can the distinc-

tion be judicially drawn? What about a janitorial supervisor, the director of a stenographic pool, a personnel manager, a deputy assistant division head, a deputy director, or even a secretary to a top-echelon director or department head who may have access to confidential information? As Judge Stevens so aptly states, there may be instances when political affiliation constitutes a proper qualification for public employment, particularly in the selection and appointment of "policy-making" officials. Indeed, no one has challenged the right of an elected official to appoint to such positions and for whatever reasons he deems proper, persons in whose loyalty and competence he has the highest confidence. The difficulty arises in attempting to fashion an appropriate and workable judicial standard for distinguishing between "policy-making" and "non policy-making" positions. In my judgment, the constitution would permit a public official to hire or dismiss on the basis of political association any employee engaged directly or indirectly in the formulation or implementation of the policies of the particular governmental office or agency. A more precise standard is difficult to articulate and thus the true impact of today's decision must necessarily await case by case determination.[4]

Another vexing and potentially troublesome problem which emerges from our ruling concerns the practical application of the burden of proof standard. It goes without

4. In addition to the inherent difficulty of defining the term, "non-policy making employee", another problem comes to the surface that is equally perplexing and is of constitutional dimension. If we must judge whether or not an employee may be discharged for exercising his First Amendment rights of free political association on the basis of his job classification, are we not saying that some employments are entitled to greater constitutional protection than others. Are the constitutional rights of an individual to be defined solely with reference to the nature of his employment? I know of no precedent in our system for imposing a "sliding scale" of importance upon the constitutional rights of individuals according to their rank, title, job description or duties, whether in or out of government.

saying, of course, that the burden belongs to and remains with the dismissed employee. It seems equally clear that since a civil service system may not be judicially imposed upon a state or local government, that a public employer cannot be compelled to explain the reasons for termination. Indeed, the imposition of such a "burden of explanation" would run counter to the precise holding of the Supreme Court in *Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079 (June 29, 1972). Thus, if a public employer desires to stand silent by way of a general denial to the employees' allegations, the employee must demonstrate by the clear and convincing weight of the evidence that his dismissal resulted solely because of his political associations. Such a burden is a heavy one but in my view is necessitated by the limited nature of the right *Sindermann* compels us to recognize today—*i.e.*, the right to be free from summary dismissal *only* where the dismissal is based solely upon a reason expressly proscribed by the First Amendment to the Constitution.

Therefore, based upon the broad holding of the Supreme Court in *Sindermann*, I concur.

KILEY, *Circuit Judge, dissenting.*

I respectfully dissent.

No case decided by this court, and none relied upon by the majority, is a precise precedent for the holding of the majority that plaintiffs'[1] discharges for partisan political reasons were constitutionally "impermissible." The Second Circuit in *Alomar* v. *Dwyer*, 447 F. 2d 482 (2nd Cir. 1971), holds to the contrary. The majority opinion's disavowal of *Alomar* is based upon footnote 9 in *Board of Regents* v. *Roth*, ... U. S. ....., 40 U. S. L. W. 5079, 5081 (June 29,

1. Plaintiffs were non-civil service employees specifically exempt from the Illinois Personnel Code. See Sm. Hurd Ann. Stat. ch. 127, § 63b104c(2) (Cum. Supp. 1972).

1972), which the majority thinks laid to rest the "premise" in *Bailey* v. *Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), *aff'd, per curiam,* 341 U. S. 918 (1950), upon which the court in *Alomar* relied in deciding that "the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations." *Alomar, supra* at 483. Judge Campbell's concurrence implies that the Supreme Court has not, at least not yet, indicated any disagreement with the *Alomar* decision. In my opinion the *Alomar* court's decision on the First Amendment issue before it is unaffected by what is said in the Supreme Court's footnote 9 in the *Roth* decision.

I am persuaded by the decision in *Alomar.* In my opinion, the district court, in the case now before us, did not err in deciding as a matter of law that plaintiffs' First Amendment right of "free political association" was not violated by their discharge by the defendant.

The majority opinion's asserted "demise" of *Bailey* in my view has no foundation in the *Roth* footnote. Justice Stewart's comments in footnote 9, considerations essential to *Roth,* are directed to the procedural decision, not to the First Amendment decision, in *Bailey.* He broadens the scope of the footnote by quoting Justice Blackmun's remark in *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971), that the Supreme Court "now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " In addition to *Graham,* Justice Stewart cites *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6 (1969), as an example of an equal protection case where the "right" v. "privilege" doctrine has been rejected; *Morrissey* v. *Brewer,* ..... U. S. ....., 40 U. S. L. W. 5016 (June 29, 1972), *Bell* v. *Burson,* 402 U. S. 535 (1971), and *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), due process cases supporting the theory of *Roth;* and *Pickering* v. *Board of Education,*

391 U. S. 563 (1968), and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the cases most germane to this appeal because they involve First Amendment claims.

In the two First Amendment cases the Supreme Court circumvented the "right" v. "privilege" theory upon a doctrine described by Professor William Van Alstyne as "The Doctrine of Unconstitutional Conditions." 81 Harv. L. Rev. 1439, 1445-1449. That doctrine in essence forbids the government from imposing conditions on government employment which would require the employee to surrender a right which he would be entitled to exercise as a private citizen. It is the implementation of the doctrine that results in the "rejection" of the "right" v. "privilege" dichotomy where First Amendment issues are involved.

The unconstitutional conditions doctrine has what Professor Van Alstyne calls a "basic flaw":

> The basic flaw in the doctrine is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government. In many cases this may be true, but the connection with the government may in certain circumstances make otherwise unreasonable conditions quite reasonable. 81 Harv. L. Rev. at 1448.

It is this "flaw" that is implicitly recognized in *Bailey's* discussion of the First Amendment claim and which is implicitly acknowledged in *Alomar*. It was the First Amendment decision in *Bailey*, not the due process decision, which the Second Circuit relied upon in rejecting the claim of Daisy Alomar that she had been discharged in violation of her associational right:

> "It is next said that the appellant's dismissal impinged upon the rights of free speech and assembly protected by the First Amendment, since the dismissal was premised upon alleged political activity

• • • But the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations." *Alomar* v. *Dwyer*, 447 F. 2d 482, 483 (2nd Cir. 1971), citing *Bailey* v. *Richardson*, 182 F. 2d 46, 59 (D. C. Cir. 1950), *aff'd, per curiam*, 341 U. S. 918 (1950).

APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT.
For the Southern District of Illinois
Southern Division

ILLINOIS STATE EMPLOYEES UNION, et al.,
Plaintiffs,
vs.
JOHN W. LEWIS,
Defendant.
No. 4743

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS.

1. This action is brought as a class suit by the Illinois State Employees Union, Council 34, American Federation of State, County and Municipal Employees (AFL-CIO), and by nineteen individuals against John W. Lewis, Secretary of State of the State of Illinois. Plaintiffs have sued in Federal Court claiming jurisdiction under the Civil Rights Act of 1871 (42 U. S. C. § 1983); the complaint alleges that the amount in controversy exceeds $10,000.00, as to each of the plaintiffs, exclusive of interest and costs. There is no diversity of citizenship.

2. The individual plaintiffs claim they were employed in the Office of the Illinois Secretary of State prior to the appointment of defendant John W. Lewis as Secretary of State by Governor Richard B. Ogilvie, on October 13, 1970.

3. Mr. Lewis was appointed by Governor Ogilvie to fill the vacancy in office caused by the death of the late secretary of State, Paul Powell, on October 10, 1970.

4. Plaintiffs allege they were employed in lower, non-policy making or clerical positions, *i.e.*, jobs "without executive discretion," in the Secretary of State's office prior to Mr. Powell's death, and that they were subsequently discharged because of their political affiliations. Specifically, the individual plaintiffs allege, on information and belief, that they were discharged because they are not members of, and have not contributed money to, the Republican Party, and have not campaigned or worked for candidates of regular organizations of the Republican Party.

5. The complaint alleges that the individual plaintiffs were given no specific reasons for their job terminations and that they were officially notified of same by letters signed by the Personnel Supervisor in the Secretary of State's Office stating that their services were no longer required. Copies of these letters are attached to the complaint.

6. The plaintiffs allege that their discharge was in violation of the First and Fourteenth Amendments to the United States Constitution; they claim they could not be terminated because of their political party activities or affiliations, and that defendant was required to afford them full procedural due process rights of notice, hearing and review prior to their termination.

7. The jobs previously held by the individual plaintiffs are non-civil service positions, *i.e.*, not within the coverage of the Illinois State Personnel Code (Ill. Rev. Stat. 1969, chap. 27, paras. 63b 101-120).

8. The plaintiffs further allege that many other non-civil service employees in the Secretary of State's Office have been terminated since defendant Lewis was appointed and that others will be in the future unless this Court interferes. Plaintiffs have prayed for temporary and permanent injunctive relief reinstating them to their jobs,

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awarding them pay lost since their discharge and prohibiting defendant from future termination of non-civil service employees because of their political affiliations and without full procedural due process.

9. The plaintiff Illinois State Employees Union claims that it represents "thousands" of members who are employed by instrumentalities of the Government of the State of Illinois. As noted above, the individual plaintiffs herein were previously, but are not now, employed by an instrumentality of the State of Illinois (the Secretary of State's Office) and the same is true of all members of the alleged class that plaintiffs seek to represent in this action. The complaint does not state, nor does it otherwise appear in the record, the manner or circumstances in which the plaintiff union or its leaders or representatives came into concert with the individual plaintiffs in instituting this action.

10. The defendant Lewis has filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, claiming that Plaintiffs have no cause of action and are entitled to no relief as a matter of law. The motion is supported by an affidavit of Mr. Lewis concerning the discharge of personnel from the Secretary of State's Office after he was appointed to that Office in October, 1970.

11. Mr. Lewis' affidavit is lengthy and the Court finds it unnecessary to make a detailed recitation of the contents of the affidavit herein. It is sufficient to state that the affidavit, which has not been disputed by the plainiffs, supports the following findings by the Court:

(a) When Mr. Lewis assumed his post as Secretary of State, he caused a survey or study to be made of the manner in which the Office was being run; he found widespread conditions of inefficiency, laxity and con-

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fusion prevailing in many divisions and sections of the Office.*

(b) As a result, Mr. Lewis believed in good faith that it was vitally necessary, in the interest of improving the efficiency of the Office and protecting the interest of the public, to make immediate and large-scale changes in the manner in which the Office was being operated and in the ranks of personnel that were then employed.

(c) In the staffing of the secretary of State's Office, Mr. Lewis has not pursued a plan of recruiting an army of personnel to perpetuate himself in office either as Secretary of State or in any other elected post or position.

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* Some examples of such conditions thus found by Mr. Lewis were:

(1) There was no effective internal auditing system or procedure in effect to maintain efficient accounting, financial record-keeping or fiscal control.

(2) There was no master or central filing system to assure safe custody, control or awareness of contracts, leases and other important documents.

(3) There were no effective controls over purchasing procedures of the office and many purchases were being made by the office in a shockingly loose manner. There was no limitation of the authority of employees to sign orders for and receive services, supplies, transportation or repairs. As a consequence there was no effective control of these matters and it was impossible to determine whether the services and supplies so ordered and received were useful or necessary in the operation of the department.

(4) The section of the office in charge of auditing of truck license plate reciprocity and prorating was grossly mismanaged in that the laws were not being enforced and truck license fees were not being collected impartially or diligently.

(5) Much mail addressed to the office by members of the public had been unanswered and ignored.

(6) Many of the public's applications for vehicle licenses had been lost or misplaced.

(7) Vendors were selling their products in State buildings without written contracts.

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CONCLUSIONS.

1. The Court has jurisdiction of the parties.

2. There is no genuine issue as to any material fact.

3. There is no support in the record to find for the plaintiffs on their claim that discharge of the individual plaintiffs and the other members of their alleged class from the Secretary of State's Office was solely because of their political affiliations or activities. On the contrary, it clearly appears, and the Court so finds, that such discharges were carried out pursuant to defendant Lewis' undisputed good faith belief that immediate and large-scale changes in the office procedures and the ranks of personnel in the Secretary of State's Office were critically necessary to improve the efficiency of the office and protect the public interest.

4. As non-civil service employees in the Secretary of State's Office the individual plaintiffs and other members of their alleged class were employees at will; the power to remove such employees is incident to the power of appointment. *Keim* v. *United States,* 177 U. S. 290; *Parsons* v. *United States,* 167 U. S. 324; *Bailey* v. *Richardson,* 182 F. 2d 46 (Dist. of Colum. Cir.). Where, as in the instant case, the discharge of such employees is not accompanied by a charge or brand of moral turpitude, security risk, or other stigma of serious personal unfitness or misconduct, the discharge may be effected summarily, without the giving of reasons, prior notice, hearing or other procedural due process steps. *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886; *Vitarelli* v. *Seaton,* 359 U. S. 535; *Parker* v. *Board of Education,* 237 F. Supp. 222, *affirmed,* 348 F. 2d 464 (4th Cir.). Summary discharge of the individual plaintiffs and other members of their alleged class did not infringe their rights under the First and Fourteenth Amendments to the U. S. Constitution.

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5. Plaintiffs' reliance on *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir.) is misplaced. In that case, the complaint attacked the Democratic patronage system in Cook County, claiming that the system was designed and operated to maintain a political patronage army that made it practically impossible for non-Democratic candidates to win an election. Members of the "army" were required to contribute money to the system's party and to do party work during both business and non-business hours. No such facts have been shown to be present in the instant case. Indeed, it appears without contradiction from the defendant Lewis' affidavit that he has not pursued a plan of building a political patronage "army" to perpetuate himself in office or in power. Rather, the record shows defendant Lewis upon assuming his office was most deeply concerned with the immediate and pressing public need to eliminate inefficiency and "dead wood" in the Secretary of State's Office; whether he was right or wrong in each and every instance of discharging (or hiring) particular employees in the process of carrying out his basic public improvement program is not a matter for this Court to second-guess or countermand. For that matter, whether he was right or wrong in appraising the overall efficiency and performance of all the personnel in his Office is not an area in which the Court can properly substitute its discretion or judgment. Absent a clear or admitted showing of firings because of a deliberate design to perpetuate an elected official or his political party in power, and thus exclude others from any practical opportunity to complete at the polls, the traditional privilege to hire and fire non-civil service public employees is clearly unaffected and undisturbed by the decision in *Shakman, supra.*

6. The plaintiffs have no cause of action and the defendant is entitled as a matter of law to a final judgment of dismissal of the action on the merits and to recover his costs. Judgment will be entered accordingly.

/s/ Omer Poos

Dated: July 23, 1971

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SUPREME COURT, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-830

JOHN W. LEWIS, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AN UNINCORPORATED LABOR ORGANIZATION; ET AL.,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not as yet reported. The docket number for the case is No. 71-1619.

STATEMENT OF THE CASE.

Suit was commenced by a labor organization and a substantial number of its members, employed in non-policy making positions in the Office of the Secretary of State of

the State of Illinois. The Respondents represented themselves, as well as other members of the organization similarly employed by the Secretary of State. Defendant to the action has been the duly appointed Secretary of State, sued as an individual and in his official capacity.

Jurisdiction of the federal court was founded under the First and Fourteenth Amendments to the Constitution of the United States of America and the United States Civil Rights Act, Title 42 United States Code Section 1983.

The Complaint was filed on January 22, 1971 alleging, by verification, that the individual Plaintiffs had been discharged, and that other members of the class were to be terminated from their positions with the Office of the Secretary of State without any statement of reasons or opportunity to be heard. In addition, the Complaint alleged that the Plaintiffs believed that the discharges were actually for one or more of the following reasons:

> (a) Each and all of the individual Plaintiffs have not been members of the regular organization of the Republican Party, a political organization, in the state, county, and municipalities where they reside and work; and/or
>
> (b) Each and all of the individual Plaintiffs have not contributed at all or sufficiently to said Republican Party; and/or
>
> (c) Each and all of the individual Plaintiffs have not campaigned and worked for candidates of the regular organizations of the aforesaid Republican Party under the direction of the officers of said Party.

The Complaint also sought a general declaratory judgment. The Plaintiffs alleged that the Defendant, in his official position as Secretary of State, imposed a general policy of terminating non-policy making employees without any statement of reasons or opportunity for an impartial

hearing to review such reasons. The Plaintiffs also alleged that the Defendant pursued a general policy of terminating employees who have not met the standards of participation in his political party, as set forth above.

The Complaint sought a declaratory judgment of the rights of the Plaintiffs and the members of the class, as well as appropriate equitable and legal relief.

The District Court summarily dismissed the complaint on the basis that no justicable cause of action could be substantiated by the Plaintiffs. Simultaneous with the dismissal of the suit, the District Court disallowed the Plaintiffs' request to engage in pre-trial discovery procedures concerning the events surrounding the dismissals of the Plaintiffs and the class they represent and the individuals hired by the new Secretary of State to replace them.

The Court of Appeals reversed the decision of the District Court and remanded the matter for a full evidentiary hearing. The majority of the Court of Appeals held that the District Court was in error in dismissing the action of the Plaintiffs as a matter of law.

REASONS FOR DENYING THE WRIT.

It is the Respondents' position that a review by the Supreme Court of the United States of the underlying substantive issues presented by the Petition for Writ of Certiorari is premature. There is no question that the subject litigation involves major federal questions under the Constitution of the United States, but the Respondents respectfully submit that review by the Supreme Court at this stage in the proceeding would not substantially resolve these federal questions but rather tend to engender a climate of confusion.

The Petitioner contends that the subject decision of the Court of Appeals clearly creates a conflict in the interpretation and application of constitutional principles to public employment among various federal and state courts. The Respondents must acknowledge that questions arising from the various state and local patronage systems in relation to rights under the First and Fourteenth Amendments to the Constitution of the United States are substantial and must at some point be resolved. The majority of the Court of Appeal's panel in the subject case has held that public employers do not have the unbridled authority to summarily dismiss non-policy making employees in the application of patronage. The Respondents submit that unless the Supreme Court of the United States is prepared to rule that public employers do have such unbridled authority, the grant of a writ of certiorari at this point would be premature.

In his majority opinion Judge Stevens points out that there are basically three areas of defense which have been raised by the Defendant-Petitioner. Firstly, Judge Stevens left open the question of whether a public employee who knowingly accepted his job on the supposition that he would be fired if the appointing officer was replaced by a member of the opposite party had any substantive rights or remedies under the Constitution and the United States Civil Rights Act. Secondly, Judge Stevens acknowledged in his opinion that the Plaintiffs-Respondents based their complaint upon the rights of non-policy making public employees. The Defendant-Petitioner's position in part is that the right to terminate at will is essential to an efficient governmental operation by the employing public official. Although Judge Stevens doubted that the type of employment responsibilities represented by the Plaintiffs involved political considerations, he did state that this represented a mixed issue of law and fact that first should be heard by the District Court.

Lastly, Judge Stevens noted the Defendant-Petitioner's general position that the efficient administration of a large governmental office required that the public official be allowed to make substantial changes in his administration without court review. Again, Judge Stevens appears to have dismissed the validity of the Defendant-Petitioner's general position but recognizes that this would be an area which could be covered and considered by the District Court upon review of testimony and other forms of evidence.

Therefore, it appears to the Plaintiffs-Respondents that a review by the Supreme Court at this juncture would be in somewhat of a vacuum. It is true that the Supreme Court could hold that the Defendant-Petitioner has complete authority to terminate at will without a statement of reasons and not be subject to review by the federal courts in the application of constitutional principles. But if the majority of the Supreme Court is not prepared to make such a far reaching decision, then review by the Supreme Court should await the development of evidence through appropriate pretrial discovery procedures and a thorough evidentiary hearing before the District Court. After that point, the Supreme Court would have before it the reasons for the dismissal of the affected public employees, the nature of their employment, the type of governmental administration involved and their reasonable expectations. The Supreme Court could also review, in light of that full disclosure, the range of appropriate remedies, if any. Under these circumstances the guidelines which would be developed by the Supreme Court for public employees and their employers would reflect the substance and nuances of such employment which would emerge from a full development of the evidence in this case and would offer clear direction to the federal courts and affected parties throughout the country.

We submit that our position would not engender further confusion or conflicts among the courts. We note in this regard that the majority opinion in *American Federation of State, County and Municipal Employees* v. *Shapp*, 280 A. 2d 375 (Pa. S. Ct., 1971), relied heavily upon the stipulated fact that all the affected public employees had been "sponsored" for their employment by a regular political organization and furthermore that that fact was stipulated to be the sole basis for their discharge. These facts are still in substantial dispute in the subject case and was in part the basis for the decision of the United States Court of Appeals as reflected in Judge Steven's opinion to remand the dispute to the District Court for a full hearing. In *Alomar* v. *Dwyer*, 447 F. 2d 282 (1971), cert. denied 404 U. S. 1020 (1972), there was also no dispute of fact that the plaintiff public employee had been discharged for solely political reasons. Furthermore, plaintiff in that case had apparently raised no issue concerning the failure of the public employer to advise the plaintiff as to the specific reasons and justification for the dismissal and an opportunity to be heard.

The Defendant-Petitioner relies heavily upon the decision of the United States Court of Appeals for the Eighth Circuit in *Norton* v. *Blaylock*, 409 F. 2d 772 (C. A. 8, 1969), for the proposition that there is conflict among the federal courts of appeal. There is nothing in either the Court of Appeals' decision in *Norton* v. *Blaylock* or the district court decision which would indicate that either court dealt directly with the question of patronage. The only issue before the district court was whether the public employer was bound by constitutional principles to accept the recommendation for continued employment of the plaintiff rendered by a merit board pursuant to a state statute. The District Court concluded that the question was one of state law and that the public employer was not bound to accept

the recommendation. The United States Court of Appeals affirmed that view. The references to political considerations by employing agencies in both the Court of Appeals and District Court decisions in *Norton* v. *Blaylock* were merely part of generalized statements covering the rights of public employers and were clearly dicta and of no apparent relevance to the decisions. The Supreme Court might also note that the plaintiff employee in *Norton* v. *Blaylock* held a major executive position within the state government.

The Plaintiffs-Respondents have already submitted to the Supreme Court their Petition for a Writ of Certiorari in the subject case concerning the "due process" issue which was rejected by the Court of Appeals. Our position relative to that issue has been fully set forth in our Petition. Both the decision of the Court of Appeals and the Petition for a Writ on the due process issue underscore the fact that review by the Supreme Court at this juncture and the issues raised in the Defendant-Petitioner's Petition for a Writ are premature. We strongly urge the Supreme Court to consider that review only of the due process issue at this point in the litigation. This issue was not involved in *Alomar* and was rejected as germane by the majority in *American Federation of State, County and Municipal Employees* v. *Shapp*. If the Supreme Court determines that under the circumstances of the subject case Plaintiffs are entitled to a statement of reasons and some form of hearing before protracted federal litigation is commenced, then all parties can substantially reduce the scope of the prospective proceedings in the District Court and substantially refine the issues of law and fact which would be left for hearing

by the District Court and, we presume, eventual review by the Court of Appeals and the Supreme Court of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-830.

JOHN W. LEWIS, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AN UNINCORPORATED LABOR ORGANIZATION, ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

We submit that respondents' brief confirms and highlights, rather than refutes, the necessity of granting certiorari in the instant case. As respondents candidly admit, the question of the constitutionality of political patronage employment must be resolved by this Court (Respondents' Brief, p. 4):

> "The Respondents must acknowledge that questions arising from the various state and local patronage systems in relation to rights under the First and Fourteenth Amendments to the Constitution of the United States are substantial and must at some point be resolved."

Despite this admission, respondents fallaciously contend that certiorari should be denied because review would allegedly be "premature" without further proceedings in the District Court. This assertion completely ignores the majority holding below and the present posture of the case. Respondents allege that they were dismissed for reasons of political patronage. Three Courts of Appeals and one State Supreme Court have held that such dismissals are constitutional; the majority decision below holds the opposite. If the other courts are correct and the Seventh Circuit wrong, the instant suit must be dismissed even if respondents could prove each and every allegation of their complaint. Further proceedings below would be manifestly useless.

Respondents themselves recognize that the alleged factual issues to be resolved below are merely "defenses" to the Seventh Circuit's holding that patronage dismissals are unconstitutional. (Respondents' Brief, pp. 4-5.) In other words, the factual questions only become relevant if the Seventh Circuit is right and the Second, Eighth, and District of Columbia Circuits, as well as the Pennsylvania Supreme Court, are wrong. Yet, this diametric conflict among the Circuits on the threshhold issue of the constitutionality of political patronage is precisely the reason Petitioner has urged in now seeking certiorari. Review by this Court alone can resolve the conflict.

Moreover, review is urgently needed *now*, not several years hence as respondents argue. Respondents are disingenuous at best in claiming that denial of certiorari "would not engender further confusion or conflicts among the courts." (Respondents' Brief, p. 6.) The Southern District of New York has already followed *Alomar* in upholding the failure to reappoint a city marshal for reasons of political patronage, *Moldawsky* v. *Lindsay*, 341 F. Supp. 1393 (S. D. N. Y. 1972). Within the Seventh Circuit itself,

all proceedings in two other cases involving political patronage dismissals have been suspended pending a decision by this Court in the instant action. *Burns* v. *Elrod*, Docket Nos. 71-1285 and 72-1541, and *Shakman* v. *Democratic Organization of Cook County*, 69 C 2145 (Memorandum Opinion of Decker, J., December 15, 1972). As Judge Campbell observed in his occurring opinion below, "it can reasonably be expected that the conflict and attendant confusion will grow and multiply as other courts are called upon to consider the same issue." (Petition for Certiorari, Appendix A, p. A-28.)

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 17, 1973.